**9.16 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Exigent Circumstances**

 In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not conducted pursuant to a search warrant. [A “search warrant” is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if:

 1. all of the circumstances known to the officer[s] at the time of the entry or the search would cause a reasonable person to believe that the entry or the search of the [person] [residence] [vehicle] [property] was necessary to prevent [destruction of evidence] [escape of a suspect] [physical harm to the officers or other persons] or [some other consequence improperly frustrating legitimate law enforcement efforts];

 2. at the time the officer made the entry or the search, the officer had probable cause to believe that a crime had been or was being committed; and

3. there was insufficient time to get a search warrant.

 “Probable cause” exists when, under all of the circumstances known to the officer[s] at

the time, an objectively reasonable police officer would conclude there is a fair probability that

the plaintiff has committed or was committing a crime.

 In order to prove the search in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

**Comment**

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally).

 It is a well-settled exception to the warrant requirement that “exigent circumstances” can justify a warrantless search consistent with the Fourth Amendment. *See Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013) (discussing various “circumstances [that] may give rise to an exigency sufficient to justify a warrantless search, including law enforcement’s need to provide emergency assistance to an occupant of a home, engage in ‘hot pursuit’ of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause” (citations omitted)); *see also Fisher v. City of San Jose*, 558 F.3d 1069, 1076-78 (9th Cir. 2009) (en banc) (discussing exigent circumstances exception to warrant requirement in context of hours-long police standoff) This exception has two requirements: “(1) that the officer had probable cause to search or arrest; and (2) that exigent circumstances justified the warrantless intrusion.” *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1221 (9th Cir. 2014), *rev’d in part on other grounds*, 575 U.S. 600 (2015) (citing *Hopkins v. Bonvicino*, 573 F.3d 752, 766-67 (9th Cir. 2009)). The Ninth Circuit generally defines “exigent circumstances as those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005).

 However, officers cannot create the exigency themselves by engaging in conduct that violates the Fourth Amendment. *See United States v. Lundin*, 817 F.3d 1151, 1158 (9th

Cir. 2016) (citing *Kentucky v. King*, 563 U.S. 452, 462 (2011)) (holding that officers unlawfully created exigency when (1) their knock caused suspect to make crashing noises inside home that were basis for exigency, and (2) officers were unlawfully standing on curtilage of suspect’s home because it was three a.m. and their only purpose was to arrest defendant).

 The Ninth Circuit has explained that the exigency exception “stems from police officers’ investigatory function [and] allows an officer to enter a residence without a warrant if he has probable cause to believe that a crime has been or is being committed and a reasonable belief that [his] entry is needed to stop the destruction of evidence or a suspect’s escape or carry out other crime-prevention or law enforcement efforts.”  *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 534 (9th Cir. 2010) (second alteration in original) (quoting *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009) (internal quotation marks omitted)). Furthermore, whether a law enforcement officer faced an exigency “must be viewed from the totality of the circumstances known to the officers at the time of the warrantless intrusion.” *Id.* at 535 (quoting *United States v. Licata*, 761 F.2d 537, 543 (9th Cir. 1985)); *see* *McNeely*, 569 U.S. at 149 (“To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances.”).

 The exigency exception may of course be invoked when police are in hot pursuit of a fleeing suspect. *See* *McNeely*, 569 U.S. at 149; *Fisher*, 558 F.3d at 1082. It should also be noted, however, that exigent circumstances will rarely justify entry without a warrant while in hot pursuit of a fleeing misdemeanant. *See Stanton v. Sims*, 134 S. Ct. 3, 6-7, 9 (2013) (finding officer entitled to qualified immunity, yet emphasizing that prior Court precedent “held not that warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare”); *see also Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (“This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry.”).

 The Supreme Court has also ruled that the natural dissipation of alcohol in the blood does not establish a *per se* exigency, and that “[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.”  *McNeely*, 569 U.S. at 156; *cf.* Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to

Warrant Requirement—Search Incident to Arrest).

 Whether officers rely upon the emergency aid or exigent circumstances exceptions to the Fourth Amendment’s general warrant requirement, they are required to conduct the search or seizure in a reasonable manner, including use of reasonable force. *Sheehan*, 743 F.3d at 1222 (applying Supreme Court’s excessive force standard under Fourth Amendment to both emergency aid and exigency exceptions). To assess whether the force used was reasonable, *see* Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force).

 A plaintiff alleging a § 1983 claim based on an unreasonable search in violation

of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action “carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]”).

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